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In the Supreme Court of the United States

OCTOBER TERM, 1975

THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS

v.

PEOPLE OF THE STATE OF CALIFORNIA EX REL. STATE WATER RESOURCES CONTROL BOARD AND STATE OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 511 F.2d 963.[1]

JURISDICTION

The opinion of the Court of Appeals (Pet. App. 35a-36a) was entered on February 13, 1975. The petition for a writ of certiorari was filed on May 14,

[1] Under the Federal Water Pollution Control Act, original jurisdiction is in the court of appeals. 33 U.S.C. (Supp. III) 1369(b)(1)(D).

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1975, and granted on June 23, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Water Pollution Control Act, as amended in 1972, requires federal facilities that discharge water pollutants to obtain state effluent discharge permits to continue operating, or whether the federal facilities are required to comply only with state substantive water pollution control requirements.

STATUTES AND REGULATION INVOLVED

Section 313 of the Federal Water Pollution Control Act, as added, 86 Stat. 875, 33 U.S.C. (Supp. III) 1323, provides as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no

> exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

Sections 306, 308, 402, 505, 509, and 510 of the Federal Water Pollution Control Act, as added, 86 Stat. 854, 858, 880, 888, 891, and 893, 33 U.S.C. (Supp. III) 1316, 1318, 1342, 1365, 1369, and 1370, in pertinent part, are reprinted in the Appendix, *infra*, pp. 43 to 52.

Section 125.2(b) of Title 40, C.F.R., provides as follows:

> The regulations in this part do not prescribe policy or procedures for the issuance of permits by States under programs approved by the Administrator pursuant to section 402(b) of the Act. Such State programs do not cover agencies and instrumentalities of the Federal Government and Indian activities on Indian lands under the jurisdiction of the United States.

STATEMENT

In our brief in *Kentucky ex rel. Hancock* v. *Train*, No. 74–220, certiorari granted, March 17, 1975,[2] we argued that under Section 118 of the Clean Air Act, as amended in 1970, 84 Stat. 1689, 42 U.S.C. 1857f, federal facilities must comply with state air emission standards or limitations, but are not required to obtain permits from state air pollution authorities in order to operate. Similarly, in the instant case the issue is whether federal facilities, in order to operate, must seek and obtain discharge permits from state agencies under Section 313 of Federal Water Pollution Control Act, as added in 1972, 33 U.S.C. (Supp. III) 1323—a provision derived from and virtually identical to Section 118 of the Clean Air Act.

A. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

In 1948, Congress enacted a major piece of legislation aimed at controlling water pollution:[3] the Federal Water Pollution Control Act. Under the original Act, as revised on numerous occasions prior to 1972,[4] the primary control mechanisms were state-developed ambient water quality standards, specifying permissible levels of pollution in particular bodies of water.[5]

[2] A copy of which we are furnishing counsel for respondents.

[3] Act of June 30, 1948, 62 Stat. 1155.

[4] See Arnold, *Effluent Limitations and NPDES: Federal and State Implementation of the Federal Water Pollution Control Act Amendments of 1972*, 15 B. C. Indus. & Comm. L. Rev. 767, n. 2 (1974).

[5] See Act of Oct. 2, 1965, Sec. 5(a), 79 Stat. 907. If the standards set by the state were too low, the Act provided a conference procedure among state and federal representatives to establish new standards. *Ibid.*

When a discharge resulted in reducing the quality of the water below this level, the state could initiate an enforcement conference among state, federal and industry representatives.[6] The federal enforcement role was limited to interstate pollution endangering health or welfare;[7] the federal government could commence an abatement suit only if the conference and a subsequent hearing had failed to result in agreement among the parties;[8] and if the pollution threatened only the health of citizens within the discharger's state, the state's Governor had to give his written consent to the federal abatement suit.[9] In 1971, the Senate Committee on Public Works, reporting on the bill that evolved into the FWPCA Amendments of 1972, found that under the existing legislation "the national effort to abate and control water pollution has been inadequate in every vital aspect" (2 *Legis. Hist.* 1425).

By the Federal Water Pollution Control Act Amendments of 1972,[10] Congress took a new approach to the problems of abating water pollution. In order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the revised Act declares that it is the national goal to eliminate

[6] 79 Stat. 907.

[7] *Ibid.*

[8] Act of July 9, 1956, Sec. 8(f), 70 Stat. 505.

[9] *Ibid.* For a description of the operation of the Act prior to 1972, see S. Rep. No. 92–414, 92d Cong., 1st Sess. 1–7 (1971), reprinted in 2 *Legis. Hist.* 1419–1425. ("*Legis. Hist.*" refers to the legislative history of the FWPCA Amendments of 1972, compiled by the Environmental Policy Division of the Library of Congress in two volumes (Committee Print, "*A Legislative History of the Water Pollution Control Act Amendments of 1972*," 93d Cong., 1st Sess. (1973)).

[10] Act of Oct. 18, 1972, 86 Stat. 816.

discharges into navigable waters by 1985.[11] This goal is to be achieved primarily by three methods set forth in the new legislation. First, the Environmental Protection Agency is required to undertake an extensive program of research and demonstration of waste treatment methods.[12] Second, the Act authorizes a massive construction program for municipal waste treatment facilities, with the federal government contributing 75 percent of the cost.[13] The third change, which is directly involved in this case, is the establishment of a new system of standards, permits and enforcement.[14]

Instead of relying upon water quality standards as the primary control mechanism,[15] the revised Act utilizes effluent limitations applicable to point sources of pollution. The term "point source" is defined as "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged."[16] Effluent limitations are restrictions established on "quantities, rates, and concentrations of chemical, physical, biological, and other constituents"

[11] Section 101(a) of the FWPCA Amendments of 1972, 33 U.S.C. (Supp. III) 1251(a).

[12] *Id.* Sections 104(d), 105(d), 33 U.S.C. (Supp. III) 1254(d), 1255(d).

[13] *Id.* Sections 201–212, 33 U.S.C. (Supp. III) 1281–1292.

[14] *Id.* Sections 301–405, 33 U.S.C. (Supp. III) 1311–1345.

[15] Water quality standards under the old Act are, however, retained: if despite effluent limitations the water quality in a certain watering is unacceptable, more stringent limitations can be established. *Id.* Sections 302, 303, 33 U.S.C. (Supp. III) 1312, 1313.

[16] *Id.* Section 502(14), 33 U.S.C. (Supp. III) 1362(14).

of discharges from point sources into the waters, including compliance schedules.[17]

Under this new system, discharges of pollutants are unlawful except in compliance with various provisions of the statute, including the provision regarding permits which will incorporate effluent limitations.[18] The new Act further provides that such limitations must require use of the "best practicable" control technology by July 1, 1977,[19] and the "best available" technology by July 1, 1983.[20] New point sources, in specified categories[21] must meet a standard of performance reflecting "the greatest degree of effluent reduction which the [E.P.A.] Administrator determines to be achievable through application of the best available demonstrated control technology * * *."[22]

In order to achieve compliance with effluent limitations, Section 402 of the 1972 Amendments[23] establishes a "National Pollutant Discharge Elimination

[17] *Id.* Section 502(11), 33 U.S.C. (Supp. III) 1362(11). The term "schedule of compliance" means "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." *Id.* Section 502(17), 33 U.S.C. (Supp. III) 1362(17).

[18] *Id.* Section 301(a), 33 U.S.C. (Supp. III) 1311(a).

[19] *Id.* Section 301(b)(1)(A), 33 U.S.C. (Supp. III) 1311(b)(1)(A).

[20] *Id.* Section 301(b)(2)(A), 33 U.S.C. (Supp. III) 1311(b)(2)(A).

[21] *Id.* Section 306(b)(1)(A), 33 U.S.C. (Supp. III) 1316(b)(1)(A).

[22] *Id.* Section 306(a)(1), 33 U.S.C. (Supp. III) 1316(a)(1).

[23] *Id.* Section 402, 33 U.S.C. (Supp. III) 1342; see also *id.* Section 405, 33 U.S.C. (Supp. III) 1345.

System (NPDES)," which authorizes the E.P.A. to issue permits to all point source discharges covered by the revised Act. In accordance with comprehensive regulations,[24] E.P.A. has been administering the NPDES and has issued more than 33,000 permits. Such permits to discharge must contain a schedule of compliance and are issued on condition that effluent limitations will be met.[25] Each permit is for a fixed term not to exceed five years [26] and, during the term, may be terminated or modified for a violation of the permit conditions, for misrepresentations, or if a change in conditions "requires either a temporary or permanent reduction or elimination of the permitted discharge." [27]

While the 1972 Amendments retained the basic policy that controlling water pollution is the primary responsibility of the states,[28] Congress provided that the states will be allowed to issue permits under the revised Act in place of the E.P.A. only if certain conditions are met. Each state "desiring to administer its own permit program" may submit to the E.P.A. its proposed program.[29] A state may not issue permits unless its permit program has been approved by

[24] 40 C.F.R. Part 125.

[25] FWPCA Amendments of 1972, Sections 301, 302, 306, 307, 33 U.S.C. (Supp. III) 1311, 1312, 1316, 1317; 40 C.F.R. 125.23, 125.24.

[26] 40 C.F.R. 125.25.

[27] 40 C.F.R. 125.22(a)(2).

[28] *Id.* Section 101(b), 33 U.S.C. (Supp. III) 1251(b).

[29] *Id.* Section 402(b), 33 U.S.C. (Supp. III) 1342(b).

E.P.A.[30] Each state's permit program must contain the elements listed in Section 402(b), and, in addition, it must comply with the guidelines established under Section 304(h). E.P.A. retains the power to review a state's implementation of its permit program. The state must transmit to the Agency copies of proposed permits; and a permit proposed by a state cannot be issued if the Administrator determines that it does not conform to the guidelines and requirements of the Act.[31]

In order to implement the provisions in Section 402 regarding state permit programs under the NPDES, the Administrator of E.P.A. has promulgated extensive regulations governing the elements that must be present in a state program.[32] Section 124.2(b) of the regulations (40 C.F.R. 124.2(b)) provides that upon approval of the state program, "the Administrator shall suspend his issuance of NPDES permits as to those point sources subject to such approved program." Under Section 125.2(b) of the regulations (40 C.F.R. 125.2(b)) such approved state programs "do not cover agencies and instrumentalities of the Federal Government * * *."

[30] *Ibid.* As of June 23, 1975, twenty-four states had received approval from the Agency to administer their own permit programs. Those states are California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Carolina, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

[31] *Id.* Section 402(d), 33 U.S.C. (Supp. III) 1342(d).

[32] 40 C.F.R. 124.1–124.94.

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Thus, E.P.A. has not delegated to the states with approved permit programs the authority to extend those programs to federal facilities. The Agency itself continues to issue discharge permits to those facilities. Within the states comprising the Ninth Circuit, E.P.A. had issued (as of March 31, 1975) 187 NPDES permits to federal facilities. At least forty other federal facilities have permit applications pending in various processing stages [33] where E.P.A. has issued written draft permits, public notices or held public hearings.[34] These federal facilities include, for example, various military installations, National Parks, National Aeronautics and Space Administration (NASA) installations and Veterans Administration hospitals.

B. THE PROCEEDINGS BELOW

In August 1973, the State of California, by and through its Water Resources Control Board, and the State of Washington filed in the Court of Appeals for the Ninth Circuit petitions for review under Section 509(b)(1)(D) of the 1972 Amendments (33 U.S.C. (Supp. III) 1369(b)(1)(D))[35] against the E.P.A. and its Administrator (App. 12–17, 21–28).

[33] E.P.A. estimates at least a six-month time lapse between the receipt of an application and the issuance of a permit.

[34] Under Sections 402(a)(1) and 402(b)(3) of the FWPCA Amendments of 1972, 33 U.S.C. (Supp. III) 1342(a)(1) and (b)(3), the opportunity for public hearing must be afforded before the issuance of a permit.

[35] Section 509(b)(1)(D) provides that the courts of appeals may review the Administrator's action "in making any determination as to a State permit program submitted under section 402(b)."

California alleged that its Governor had submitted to E.P.A. on February 15, 1973, and April 10, 1973, a permit program "which the State proposed to operate within its jurisdiction as part of the NPDES" (App. 15). The E.P.A. approved California's program,[36] by letter dated May 14, 1973, and informed the state's Governor that E.P.A. was suspending the issuance of permits "under Subsection (2) of Section 402 of the Act as to all discharges in the State of California, other than those from agencies and instrumentalities of the Federal government" (*id.* at 18). The E.P.A.'s refusal to allow the state to apply its permit program to federal facilities, California charged, violated Sections 402 and 313 of the Act (*id.* at 16).

The State of Washington made a similar contention in its petition for review, which alleged that the E.P.A.'s Regional Administrator advised the state on June 12, 1973, that E.P.A. would not "delegate permit issuance for federal facilities to any state" (App. 25). On July 20, 1973, the E.P.A. Regional Administrator rejected State's proposed permit program because it was "missing important components" and, on the same day, advised the State's Department of Ecology that E.P.A. had "sole authority to issue permits to federal facilities" (*ibid.*). Upon the State's resubmission of its program, the Administrator of the E.P.A., on November 14, 1973, approved the program and advised the State that E.P.A. was suspending its issuance of NPDES permits except with respect to federal facilities (*id.* at 29).

[36] California was the first state to receive approval of a state permit program (App. 18).

The court of appeals held that "the 1972 amendments to the Federal Water Pollution Control Act clearly mandate a federal agency duty of full compliance with all aspects of state permit programs" (Pet. App. 28a). Therefore, the court declared invalid 40 C.F.R. 125.2(b), insofar as that provision exempted federal facilities from State permit procedures, and directed the Administrator to reconsider the disapproved portions of the permit programs submitted by California and Washington and to act expeditiously in a manner consistent with its opinion (Pet. App. 29a). In so holding, the court noted that the language of Section 313, which is central to these cases, is virtually identical to the language of Section 118 of the Clean Air Act, as amended, 42 U.S.C. 1857f (Pet. App. 23a–24a), and explicitly recognized that the Fifth and Sixth Circuits had arrived at conflicting interpretations of Section 118 of the Clean Air Act (Pet. App. 24a).[37]

SUMMARY OF ARGUMENT

I

Section 313 of the Federal Water Pollution Control Act Amendments of 1972 directs federal agencies and facilities to "comply with * * * State * * * and

[37] *Alabama* v. *Seeber*, 502 F. 2d 1238 (C.A. 5), petition for certiorari pending, No. 74–851 (holding that federal facilities are subject to state permit procedures); *Kentucky ex rel. Hancock* v. *Ruckelshaus*, 497 F. 2d 1172 (C.A. 6), certiorari granted *sub nom. Kentucky ex rel. Hancock* v. *Train*, March 17, 1975, No. 74–220 (holding that federal facilities are not subject to state permit procedures).

local requirements respecting control and abatement of pollution * * *."

Standing alone, Section 313 and its key word, "requirements," fail to provide a definitive answer to the question regarding the nature and scope of the waiver of federal immunity from state regulation intended by Congress when it adopted that provision. Petitioners maintain that the waiver does not extend beyond federal compliance with state effluent standards and limitations, including compliance schedules. California and Washington, on the other hand, contend that the waiver extends beyond such state substantive standards to state administrative procedures involving state effluent discharge permits.

Resolution of this dispute must take account of the Supremacy Clause and the Plenary Powers Clause of the Constitution, the effect of which is that the states cannot regulate the federal government, its agencies, or its activities, nor can they extend their regulations to federal enclaves. Congress can affirmatively waive federal immunity from state regulation but in view of this traditional and constitutional division of powers between the federal government and the states, any such congressional waiver must be clear, unambiguous and unequivocal.

Thus, Section 313 can subject federal facilities to state regulation through a state permit program only insofar as Congress has actually considered the matter and decided that the states should have such regulatory authority over the activities of the federal government.

II

Section 313 of the FWPCA is derived from Section 118 of the Clean Air Act and the surest guide to the meaning of "requirements" in Section 313 is that the same term, as used in the corresponding section of the Clean Air Act, does not comprehend state permit procedures.

Contrary to the court below, there is no reason to read the two Acts differently. The court erred in stating that Section 510 of the FWPCA has no Clean Air Act counterpart—Section 116 of the latter Act is virtually identical to Section 510. Neither provision aids in deciding the meaning of "requirements" as used in Section 313 (or Section 118 of the Clean Air Act) since the same term in Section 510 refers to something other than state standards or limitations yet all agree that "requirements" under Section 313 include at least this.

Also, the fact that Section 313 refers to federal facilities paying reasonable service charges, while Section 118 of the Clean Air Act does not, cannot serve to distinguish the statutes and does not lead to the conclusion that "requirements" include state permit procedures. The reference to reasonable service charges means only that federal facilities must pay their fair share of the cost of sewer service and sewerage treatment.

Moreover, Section 306(c) exempts new federal facilities from state enforcement of standards, and Section 308(c) denies the states the power to inspect, monitor, or enter federal point sources. Thus, even if states could issue permits to federal facilities, Con-

gress did not give them the power to make those permits effective. Section 402(b) allows the states to administer their own permit program upon the determination of the E.P.A. Administrator that the state's program meets the conditions set forth therein. Yet two of those conditions are that the state program include the powers specifically denied to the states with respect to federal facilities by Sections 306(c) and 308(c). Hence, the Act itself bars the states from devising acceptable permit programs to apply to federal facilities.

As to Section 505(f), this is the Act's mechanism available to states (and to other parties) for the purpose, *inter alia,* of judicially enforcing the federal facility compliance provision. That section lists certain provisions of the FWPCA, with respect to some of which federal installations must comply, but it does not furnish a clear definition of the meaning of "requirements" in Section 313.

Among the provisions enumerated in Section 505(f) is the state certification requirement, which is established by Section 401 as a prerequisite to federal permitting of a discharge source. However, by Section 401(a)(6) federal facilities are exempt from the state certification procedure, thus underscoring the congressional intent that the federal government should not be subject to state administrative procedures.

III

Examination of the legislative history of Section 313 reveals no congressional intent to subject federal agencies and facilities to state permitting authority.

With respect to Section 313, the Senate, the House, and the Conference Committee stated only that federal facilities were to comply with state substantive abatement standards and limitations. However, neither the committees nor any individual member of Congress demonstrated any intent at any time to extend federal compliance beyond that point. There is, in short, nothing to suggest that Congress ever contemplated that federal facilities would be required to comply with state permit procedures and all indications are that "requirements" in Section 313 meant only state standards and limitations.

IV

Finally, the interpretation applied to Section 313 by the E.P.A., the agency charged with administering the FWPCA, has not extended state permitting authority to federal installations. That agency interpretation should be given substantial weight in determining the meaning of the federal facilities provision and should not be rejected unless there are compelling reasons why it is wrong. Such reasons are wholly absent here.

ARGUMENT

SECTION 313 OF THE FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED IN 1972, DOES NOT REQUIRE FEDERAL FACILITIES TO SEEK AND OBTAIN STATE DISCHARGE PERMITS IN ORDER TO OPERATE WITHIN THE STATE

I

INTRODUCTION

The dispute in this case concerns the meaning of the first sentence of Section 313 of the Federal Water Pollution Control Act, as amended in 1972, 33 U.S.C. (Supp. III) 1323,[38] which provides that:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local *requirements* respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. [Emphasis supplied.]

Respondents argue that the language in Section 313's first sentence—"shall comply with * * * State, * * * and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements"—means that facilities of the executive, legislative and judicial branches of the federal government must comply not only with state effluent limitations and compliance schedules, but also with state regulations demanding that sources of discharges—including federal facilities—obtain discharge permits.

[38] Section 313 is set out in full at pp. 2–3, *supra*.

We contend, however, that the phrase means only that facilities of the executive, legislative and judicial branches operating within the states must comply with the applicable effluent limitations and compliance schedules promulgated by the particular state pursuant to its E.P.A.-approved implementation plan.[39]

Underlying this controversy regarding the proper interpretation of Section 313 of the Act are principles of federalism derived in part from the Supremacy Clause and the Plenary Powers Clause of the Constitution.[40] As the court below recognized, the Supremacy Clause bars state regulation of the federal government and its activities and the Plenary Powers Clause prohibits the extension of state regulatory power into areas of exclusive federal legislative jurisdiction (Pet. App. 10a).

Federal-state relationships have, from the beginning, been governed by these principles,[41] the

[39] See Section 303(e), 33 U.S.C. (Supp. III) 1313(e).

[40] The Supremacy Clause (Art. VI, cl. 2) reads as follows:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In pertinent part, the Plenary Powers Clause (Art. I, Sec. 8, cl. 17) reads as follows:

> The Congress shall have Power * * * [t]o exercise exclusive Legislat[ive] * * * Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; * * *

[41] In regard to the Supremacy Clause, the leading case is, of course, *McCulloch* v. *Maryland*, 4 Wheat. 316. See also, *e.g.*, *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Van Brocklin* v. *Tennessee*, 117 U.S. 151; *Ohio* v. *Thomas*, 173 U.S. 276; *Johnson* v. *Maryland*, 254 U.S. 51; *Hunt* v. *United States*, 278 US. 96; *Arizona* v. *California*, 283 U.S. 423; *Mayo* v. *United States*, 319 U.S. 441; *California Commission* v. *United States*, 355 U.S. 534; *United States* v. *Georgia Pub. Serv. Commission*, 371 U.S. 285. Neither the purpose of the state law or regulation nor its importance to the state alters the effect of the Supremacy Clause. See *Free* v. *Bland*, 369 U.S. 663, 666.

The case law relating to the Plenary Powers Clause predates *McCulloch* v. *Maryland*, *supra*, by at least eight years. The Supreme Judicial Court of Massachusetts held that the Plenary Powers Clause prohibited state regulation of liquor sales in the federal small arms factory at Springfield. *Commonwealth* v. *Clary*, 8 Mass. 72.

During the years since *Clary*, state efforts to intrude upon the domain which the Plenary Powers Clause entrusts exclusively to Congress have been consistently rejected. See, *e.g.*, *Humble Pipe Line Co.* v. *Waggonner*, 376 U.S. 369; *Pacific Coast Dairy* v. *Dept. of Agriculture*, 318 U.S. 285; *Collins* v. *Yosemite Park Co.*, 304 U.S. 518; *Standard Oil Co.* v. *California*, 291 U.S. 242; *Surplus Trading Co.* v. *Cook*, 281 U.S. 647; *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525, 533; cf. *Paul* v. *United States*, 371 U.S. 245.

[42] See *The Federalist* Nos. 43 and 44 (1961) (Madison).

[43] Beard, *The Enduring Federalist* (1959) p. 187.

underlying purpose of which is to avoid even the potential for state interference with the lawful functions of the federal government.[42] As James Madison stated in *The Federalist* No. 43,[43] "The public money expended on [federal installations], and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it."

These considerations are no less valid today than they were two centuries ago when the Founders em-

bodied them in the Constitution. To be sure, Congress can decide to modify the normal federal-state relationship by affirmatively granting to the states the power to control certain federal activities.[44] But in light of the firmly-established constitutional principles discussed above, the Court has not readily assumed that Congress decided to waive traditional federal immunity from state control. Instead, the congressional waiver must be clear and unambiguous and it must be unequivocal.[45]

It is in light of this considerable background of constitutional law that we approach the question of the proper interpretation of Section 313 of the Federal Water Pollution Control Act.

II.

WHEN READ IN LIGHT OF THE STATUTE AS A WHOLE, THE LANGUAGE OF SECTION 313 DIRECTING FEDERAL FACILITIES TO COMPLY WITH STATE WATER POLLUTION "REQUIREMENTS" MEANS ONLY THAT SUCH FACILITIES MUST MEET STATE STANDARDS AND LIMITATIONS, INCLUDING COMPLIANCE SCHEDULES

On its face, Section 313 does not reveal a clear, unambiguous, unequivocal congressional waiver of the authority of the federal government to conduct activities inside a state without its permission, given in the

[44] See in regard to waiver of the Supremacy Clause, *Mayo* v. *United States*, 319 U.S. 441, 448; and in regard to the Plenary Powers Clause, *Paul* v. *United States*, 371 U.S. 245; *United States* v. *Sharpnack*, 355 U.S. 286; *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558.

[45] See, *e.g.*, cases cited in note 44, *supra;* see also *United States* v. *Sherwood*, 312 U.S. 584, 590; *United States* v. *King*, 395 U.S. 1, 4.

form of a permit. The pertinent phrase in Section 313 provides that federal facilities must "comply with * * * State, * * * and local requirements respecting control and abatement of pollution" and the single word, which is the key to the meaning of Section 313 and at the center of this case, is "requirements."

While federal facilities must comply with state requirements, Section 313 itself is of little assistance in determining what is meant by "requirements." The language following the quoted phrase—"to the same extent that any person is subject to such requirements"—does not advance the inquiry: it explains only to what extent federal facilities must comply with applicable state provisions but does not say which state provisions are applicable.

Without looking further, however, we do know that Section 313 of the FWPCA Amendments is derived from[46] and virtually identical to Section 118 of the Clean Air Act, as amended in 1970,[47] and that the operative language just quoted is the same as that in the Clean Air Act provision, save for the FWPCA's deletion of the word "air" preceding the term "pollution." Since there is no indication that the two statutes were intended to mean something different in regard to state authority over federal facilities, the most certain guide to the meaning of Section 313 of the FWPCA Amendments is that its earlier counterpart in the Clean Air Act does not direct federal facilities to obtain state air pollution permits, as we have

[46] See p. 34, *infra.*

[47] 42 U.S.C. 1857f.

argued in our brief in *Kentucky ex rel. Hancock* v. *Train,* No. 74–220, certiorari granted March 17, 1975.

The court of appeals in this case, however, believed that the two statutes could properly be subject to conflicting interpretations because the first sentence of Section 313 of the FWPCA Amendments ends by stating that "requirements" include "the payment of reasonable service charges," while Section 118 of the Clean Air Act contains no comparable language; and because Sections 510[48] and 402[49] of the FWPCA Amendments have no Clean Air Act counterparts (Pet. App. 24a–25a).

With respect to Section 510, the court's statement is not accurate. Section 510 of the FWPCA Amendments not only has a counterpart in the Clean Air Act, it was copied directly from Section 116 of that Act. This is unmistakable when the language of Section 116[50] is compared with that of Section 510:[51] the

[48] 33 U.S.C. (Supp. III) 1370.

[49] 33 U.S.C. (Supp. III) 1342.

[50] Section 116 of the Clean Air Act, as amended in 1970, 42 U.S.C. 1857d–1, reads as follows:

> Except as otherwise provided in sections 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

[51] See Appendix, *infra*, for the full text of Section 510.

references to the states' right to set a more restrictive (1) "standard or limitation" or (2) "requirement respecting control or abatement of pollution" are common to both statutes. Moreover, contrary to the court below,[52] the Section 510 phrase containing the word "requirement" does not give content to the meaning of the same word in Section 313. As used in Section 510, the term refers to something distinct from a "standard or limitation respecting discharges of pollutants," yet the one area of agreement between the parties here is that the same word—"requirements"—as used in Section 313 does comprehend such standards or limitations.[53] To view the matter otherwise by looking to Section 510 in order to define Section 313 would lead to the untenable result that federal facilities must comply with state permit procedures but not with state substantive standards or limitations respecting the discharge of pollutants.

While the court of appeals thus erred in stating that Section 510 had no Clean Air Act counterpart and in relying on that provision, the court did correctly point out that no clause in Section 118 of the Clean Air Act corresponds to the "reasonable service charges" clause in Section 313 of the FWPCA Amendments. The court of appeals read that language to mean "charges incident to state permit programs," a reading that supported the court's view that

[52] Pet. App. 21a–22a.

[53] We made the same point in our Brief (at pp. 20–21) in *Kentucky ex rel. Hancock* v. *Train*, *supra*, with respect to Section 116 of the Clean Air Act.

under Section 313 federal facilities must obtain state permits (Pet. App. 16a). There is, however, no basis for that interpretation of the clause in either the FWPCA or its legislative history—unless one first assumes the court of appeals' ultimate conclusion on the issue of this case.

The most apparent explanation why the reasonable service charge clause does not appear in the Clean Air Act lies in the fact that the Air and Water Acts deal with two different elements of the environment. Sewer systems carry the effluent discharges associated with water, and for that service and for the treatment of such wastes (in sewerage treatment plants) a charge is levied upon the user for the service received. There is no equivalent waste discharge collection technology for air emissions and, therefore, no equivalent services for which charges can be levied.

While it might have been unnecessary for Congress to direct federal facilities to pay their share of municipal sewer system costs (Pet. App. 17a), Congress may well have believed that those facilities should pay *only* their fair share of such costs. This much is at least indicated by the inclusion of the word "reasonable" in the clause: what Congress appears to have done is to *protect* specifically federal agencies and facilities against any possibility that state or local governments might attempt, in effect, to extract from the national treasury an unauthorized subsidy by levying upon federal installations a disproportionately high service charge. And in this regard Congress' action is, of course, entirely consistent with the purposes

of the Supremacy Clause and the Plenary Powers Clause of the Constitution and the traditional federal-state relationship reflected therein (see pp. 18–20, *supra*).

We turn now to Section 402, the third provision relied upon by the court of appeals. As we discuss below, analysis of Section 402, far from supporting the court's interpretation of "requirements" in Section 313, leads to the conclusion that federal facilities are not subject to state permit programs.

Section 402(b) sets out nine criteria that a proposed state permit program must meet in order for the Administrator to approve it and to delegate his permitting authority to the state.[54] Congress made those criteria essential to any state permit program, so essential that according to the language of the statute, the E.P.A. Administrator cannot approve a program from which *any* of the elements is missing.

The first criterion, Section 402(b)(1)(A), provides in pertinent part (emphasis added):

> The Administrator shall approve each such submitted program *unless* he determines that adequate authority does not exist:

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[54] Basically, they are the same elements Congress included in the federal permit program (prior to a delegation of authority to the States). See Section 402(a), 33 U.S.C. (Supp. III) 1342(a).

Use of the conjunctive "and", tying subsection (b)(9) to its eight predecessors, makes it clear that Congress did not intend the nine criteria as options among which the states or the Administrator could choose, but that each and every one must be included in any state program before it could be approved by the Administrator.

> (1) To issue permits which—(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, *306*, 307, and 403; * * *

Section 306 (33 U.S.C. (Supp. III) 1316) deals with the establishment of standards of performance for new sources. Under Section 306(b)(3), those standards apply to new sources owned or operated by the United States. However, Section 306(c) reads as follows:

> Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (*except with respect to new sources owned or operated by the United States*). [Emphasis supplied.]

Thus, in its proposed Section 402 permit program a state must be able to apply and enforce Section 306 standards if that program is to be approved *and* if that program is to be effective, but the state's procedures for applying and enforcing those standards are not to be employed against federal facilities.[55] On the other hand, federal facilities must comply with Section 306 standards; that is one of the two sets of

[55] The court of appeals recognized the federal facility exemptions in Sections 306(c) and 308(c) (*infra*), but did not attempt to determine the effect of those exemptions upon other provisions in the Act (Pet. App. 23a and n. 16).

standards (Section 307 being the other) from which not even the President can exempt them, according to Section 313. This interrelationship of provisions leads to the quite firm conclusion that enforcement of federal compliance with Section 306 must be accomplished by some means other than state permits.[56]

The second prerequisite to E.P.A. approval of a state permit program is contained in Section 402(b)(2)(B), which reads as follows (emphasis supplied):

> The Administrator shall approve each such submitted program *unless* he determines that adequate authority does not exist:
>
> * * * * *
>
> To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act; * * *

Congress thus recognized that essential to the application and enforcement of any pollutant discharge abatement program are the inspection, entry, and monitoring of sources in order to insure compliance with abatement standards. A state must be able to monitor, inspect, and enter sources subject to its permits or the permit program cannot be approved by the Administrator.

However, the relevant provision—Section 308—flatly denies the states the power to inspect, monitor,

[56] For an explanation of the means by which Federal compliance with Section 306 can be assured by the states, see discussion of Section 505, 33 U.S.C. (Supp. III) 1365, *infra*, at pp. 29 to 32.

Section 306 is unique in that, when it is violated, suit can be brought under Section 505(a) without the sixty-day notice required by Section 505(b).

and enter federally owned or operated point sources. Section 308(c), 33 U.S.C. (Supp. III) 1318(c), provides:

> If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (*except with respect to point sources owned or operated by the United States*). [Emphasis supplied.]

Again, as with the relationship between Sections 402(b)(1)(A) and 306(c), Congress has specifically identified certain functions as essential to the implementation of an effective state permit program, indeed so essential that without them a state's program cannot be approved—and yet has specifically denied the states the power to carry out precisely those essential functions with respect to federal facilities. The logical conclusion, once again, is that the permitting authority Congress chose to make available to the states did not extend to federal facilities.

Indeed, the effect of the court of appeals' holding is to amend the FWPCA by reading out of existence the congressional directions in Section 306(c) and 308(c). Only by such judicial revision could the E.P.A. Administrator circumvent those provisions and approve the Washington and California permit programs pursuant to Section 402(b) insofar as the states' programs apply to federal facilities. In sum,

within the context of the FWPCA, Section 402(b) not only fails to support the court of appeals' conclusion, but is squarely against it.[57]

Section 505, 33 U.S.C. (Supp. III) 1365, is the only other provision to which the court devoted any significant attention.[58] However, that section affords little, if any, support to the court of appeals' position.

Section 505 is a rather complex multi-functional provision. It is the only jurisdictional provision within the Act for civil suits under the Act; it is the sole waiver of federal immunity[59] from suit for civil

[57] The court of appeals itself acknowledged the weakness of its own decision in the absence of those supporting bases heretofore discussed:

> Considered in the light of Sections 402 and 510, other sections in the Act afford added support to petitioners' interpretation of the term "requirements" in Section 313, *though the significance of each would have been less certain apart from these two sections.* [Pet. App. 22a–23a; emphasis supplied.]

[58] Section 505(a) establishes jurisdiction in federal courts, limits that jurisdiction to civil actions, eliminates the requirements of a minimal amount in controversy and diversity of citizenship, and defines standing for such an action.

The jurisdiction conferred by Section 505(a) is conditioned specifically upon compliance with the sixty-day notice of suit prerequisite established in Section 505(b).

Under Section 509(b), 33 U.S.C. (Supp. III), 1369(b), certain specific actions of the Administrator can be reviewed exclusively in the appropriate court of appeals on petition. The instant case focuses upon one of the types of action identified in Section 509(b) for such treatment. Another is a challenge to an individual permit. Section 509(b)(1)(F).

[59] That waiver is limited to actions against the federal government or its agencies for violations of an effluent standard or limitation (Section 505(a)(1)) and actions against the E.P.A. Administrator for failure to perform non-discretionary functions under the Act (Section 505(a)(2)).

relief within the Act;[60] and it is the enforcement provision designed to be used by the states to insure compliance with Section 313, *inter alia*.[61]

Section 505(f) refers, in a parenthetic clause, to Section 313, but this only supports petitioners' position

[60] From the fact that by California law some substantive limitations may be set following administrative hearings in which a discharger may participate, the court of appeals inferred a federal susceptibility to state administrative procedures under the predecessor to Section 313, and it used that inference as guidance in reaching its decision. (Pet. App. 9a.)

The weakness of that approach lies with the fact that there is a marked contrast between participation in hearings and a state permit. The latter is an instrument which may be issued or withheld, thereby giving the states actual control over the operations of the federal government.

As to how a state will establish those standards with which federal facilities must comply, Section 313 is silent; it assures only federal compliance with state standards. It is not a guarantee that the states will not have to modify their administrative practices in order to accommodate the legal characteristics of the federal government, its agencies, and its instrumentalities.

However, federal agencies must cooperate with the states with respect to compliance. Executive Order 11752, Section 3 (a)(2), 38 Fed. Reg. 34793, 34794. Hence, they are required to provide states with whatever data are needed for standard setting.

[61] The enforcement mechanism of Section 505(a) is available to the states because a "State" is a "person" (Section 502(5), 33 U.S.C. (Supp. III) 1362(5)), a "person" is a "citizen" (Section 505(g), 33 U.S.C. (Supp. III) 1365(g)), and a citizen can bring suit under Section 505(a).

By providing states with this enforcement procedure through Section 505, Congress has eliminated what would otherwise appear to be a loophole left because the Act does not extend state permitting authority to federal facilities. By Section 313, as well as by Executive Order 11752, *supra*, federal facilities are required to meet applicable substantive standards and limi-

regarding the enforcement function of Section 505. Borrowed directly from Section 304(f) of the Clean Air Act, as amended,[62] the federal facilities compliance reference in Section 505(f) comes at the end of a list

tations. Hence, it would be redundant to impose upon them those same requirements under the authority of a state permit. If a federal installation fails to meet the relevant standards or limitations, it is not a state permit which the state can enforce to secure compliance, but rather the federal law through civil suit.

That Section 505 was intended to be the states' enforcement mechanism for federal facility compliance with Section 313 is made abundantly clear by the legislative history concerning the corresponding provisions in the Clean Air Act, Sections 118 and 304, 42 U.S.C. 1857f and 1857h–2, respectively, as we pointed out in our Brief (at pp. 24–26) in *Kentucky ex rel. Hancock* v. *Train*, *supra*.

The Clean Air Act's legislative history is quite relevant to the FWPCA with respect to the "citizen suit" provision, since Section 505 of the FWPCA is modeled upon Section 304 of the Clean Air Act. S. Rep. No. 92-414, 92d Cong., 1st Sess. 79 (1971); 2 *Legis. Hist.* 1497.

[62] Section 304(f) of the Clean Air Act, 42 U.S.C. 1857h-2(f), reads as follows:

> (f) For purposes of this section, the term "emission standard or limitation under this Act" means—
>
> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or
>
> (2) a control or prohibition respecting a motor vehicle fuel or fuel additive,
>
> which is in effect under this Act (*including a requirement applicable by reason of section 118*) or under an applicable implementation plan. [Emphasis supplied.]

A comparison of the Clean Air Act's Section 304(f) with the FWPCA's Section 505(f) (see Appendix, *infra*) undercuts the court of appeals' contention that the Water Act provision is in any way substantially different in form or effect from its Air Act counterpart (Pet. App. 25a).

of six categories of provisions[63] (the last of which is permits) that may be enforced by a Section 505 suit. However, this cannot be read to mean that all six of the enumerated categories are to be considered "requirements" under Section 313. As we discuss below, category (5) refers to certificates under Section 401 (33 U.S.C. (Supp. III) 1341), and federal facilities are expressly exempted from having to obtain such certificates. (Section 401(a).) Thus, Section 505(f) gives no guidance in regard to which of the listed provisions are "requirements" under Section 313. To determine this, other sections of the Act must be consulted, as we have done above.

As to Section 401 itself, this provides that before any "applicant" for a federal permit from E.P.A. under Section 402 can operate a facility, the applicant must first obtain from the state in which the discharge will originate a certificate that such discharge will comply with the effluent limitations and standards pursuant to Sections 301, 302, 306 and 307.[64]

[63] Section 505(f) provides in full:

> For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title, (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

[64] 33 U.S.C. (Supp. III) 1311, 1312, 1316, 1317.

However, Congress expressly provided that no federal agency "shall be deemed to be an applicant for the purposes of" Section 401(a); in short, unlike other pollutant sources, federal facilities are not to be subject to state certification procedures, compliance with which would otherwise be a prerequisite for a federal permit or license. See Section 401(a)(6), 33 U.S.C. (Supp. III) 1341(a)(6).

The specific exemption for federal facilities in Section 401(a) is still further support for our reading of Section 313: when Congress had the opportunity to subject federal facilities to state control (by the state's withholding a certificate) it followed the traditional course reflected in the Supremacy Clause. Since state certification is so analogous to a state permit, there is we submit no reasonable explanation why Congress would have subjected federal facilities to state permit procedures and yet exempted such facilities from state certification procedures.

III.

THE LEGISLATIVE HISTORY OF SECTION 313 CONFIRMS THAT CONGRESS DID NOT INTEND TO ALTER THE TRADITIONAL FEDERAL-STATE RELATIONSHIP BY REQUIRING FEDERAL FACILITIES TO OBTAIN STATE DISCHARGE PERMITS

If there is any remaining uncertainty about the proper interpretation of Section 313, this is removed upon examination of the legislative history of that provision. In regard to this evidence, the focus must again be on the word "requirements" contained in the first sentence of Section 313. The language of the

first sentence in both Section 313 of Senator Muskie's original Senate Bill, S. 2770, and in the original House version of the bill, H.R. 11896, is nearly identical with the language of that section ultimately enacted into law. 2 *Legis. Hist.* 1676–1677; 1 *Legis. Hist.* 1040–1041.

In the Report of the Senate Committee on Public Works accompanying S. 2770, the most pertinent paragraphs in the brief discussion of Section 313 read as follows:[65]

> This section, similar to one in existing law, requires that Federal facilities meet the same *effluent limitations* as private sources of pollution, unless the Federal facility is specifically exempted by the President. The President cannot exempt any source from requirements of Sections 306 and 307.
>
> This section would require every Federal agency with control over any activity or real property, to provide national leadership in the *control* of water pollution in such operations.
>
> * * * Lack of Federal leadership has been detrimental to the *water pollution control effort.* The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens.

The House Committee on Public Works Report on H.R. 11896 also described the nature of the compliance demanded of federal facilities under Section 313:[66]

> This section requires that Federal facilities meet the same *effluent limitations,* other *limitations, performance standards, toxic effluent standards* and thermal discharge *regulations* as private sources of pollution, unless the Federal facility is specifically exempted by the President. The President cannot exempt any source from the requirements of sections 306 and 307.[67]

The words and phrases used by the Committees—"effluent limitations," "limitations," "performance standards," and "effluent standards"—certainly do not refer to, and do not suggest, an intention to submit federal facilities to state permit procedures; rather, all point to federal compliance with applicable substantive pollution abatement requirements. Indeed, both Reports first describe the "requirements" of Section 313 as "effluent limitations," which are dealt with in Section 301 of S. 2770 and H.R. 11896,[68] and of the Act, 33 U.S.C. (Supp. III) 1311 ("Effluent Limitations"). From original bill through final Act, Section

[65] S. Rep. No. 92–414, 92d Cong., 1st Sess. 67 (1971); 2 *Legis. Hist.* 1485 (emphasis added).

[66] H.R. Rep. No. 92–911, 92d Cong., 2d Sess. 118 (1972); 1 *Legis. Hist.* 805 (emphasis added).

[67] During the House debate on the bill, Representative Jones, a member of the House Commitee, described section 313 as follows (1 *Legis. Hist.* 361): "Requires Federal facilities to meet the same *effluent limitations* and *water quality* standards as private sources of pollution unless the facility is specifically exempted by the President." [Emphasis supplied.]

[68] S. 2770, 92d Cong., 1st Sess. 75 (1971); H.R. 11896, 92d Cong., 2d Sess. 266 (1971); 2 *Legis. Hist.* 1608; 1 *Legis. Hist.* 962.

301 has been devoted entirely to the actual elimination of the physical discharge of pollutants into the water; it does not speak at all of administrative permit procedures.[69]

Similarly, in varying contexts, the word "standard" is found in several sections of the bills and of the FWPCA. Section 303 of H.R. 11896 and of the Act, 33 U.S.C. (Supp. III) 1313, addressed "Water Quality Standards and Implementation Plans," [70] and Section 307, 33 U.S.C. (Supp. III) 1317, relates to "Toxic and Pretreatment Effluent Standards." Each of those sections discusses "standards" in the sense of numerical measurements. Furthermore, Section 306(a)(1), 33 U.S.C. (Supp. III) 1316(a)(1) ("National Standards of Performance") defines a "standard of performance" (or "performance standard," as used in the House Report) as a "standard for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction * * * achievable through application of the best available demonstrated control technology * * *." Again, the subject of the statutory provision is numerical measurements and the technological means of attaining those quantitative levels.

[69] Section 302, entitled "*Water Quality Related Effluent Limitations*" in the bills and in the FWPCA, also fails ever to suggest any extension of state administrative procedures to federal facilities. Its focus is upon the physical quality of water.

[70] Section 303 of S. 2770, dealing with "Aquaculture," corresponds to Section 318 of H.R. 11896 and of the final Act. In S. 2770 there was no section corresponding to Section 303 of the House bill and of the final FWPCA Amendments. 1 *Legis. Hist.* 305–307.

Thus, in each of the sections relating to the subject of "standards," the single fact most relevant to this discussion is that none involve the administrative procedures of a permit program.

The word "control" appears several times in the previously mentioned congressional material, and it appears again in the Senate Committee's explanation of the Presidential exemption provision of Section 313 [71] in relation to the term "requirement": [72]

> The Committee recognizes, however, that it may be in the paramount interest of the United States that a plant or facility not achieve full water pollution *control* within the time required.

Thus, the requirement from which a facility may be exempted in the control of its pollution, that is, the control of actual physical discharge; the relevant requirement is not a state's permit procedure.

Following the development of S. 2770 and H.R. 11896 in their respective Houses of Congress, a Joint Conference Committee was convened to consider the Senate and House versions. The Conference Report indicates that in regard to Section 313 there were no differences to be resolved: [73]

[71] S. Rep. No. 92–414, *supra*, at 68; 2 *Legis. Hist.* 1486 (emphasis added).

[72] This part of Section 313 provides in relevant part:

"* * * The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a *requirement* if he determines it to be in the paramount interest of the United States to do so * * *." [Emphasis supplied.]

[73] S. Conf. Rep. No. 92–1236, 92d Cong., 2d Sess. 135 (1972); 1 *Legis. Hist.* 318 (emphasis added).

Senate bill

Section 313 requires Federal facilities to meet the same *effluent limitations* as other sources of pollution, unless the facility is specifically exempted by the President. The President cannot exempt a Federal source from national performance standards or toxic and pretreatment standards.

House amendment

Section 313 requires Federal facilities to meet the same *requirements* as private sources of pollution unless specifically exempted by the President in essentially the same manner as the Senate bill.

Conference substitute

This section is *the same as* the Senate bill and the House amendment.

If, and the Conference Committee Report states, "effluent limitations" mean the same as "requirements," then under Section 313 federal facilities must meet such limitations. Neither the Conference Report nor the preceding congressional explanations of Section 313's meaning, however, give any indication that the section additionally commands compliance with state and local permit procedures.

The command of Section 313 is thus that federal facilities control their pollution; it is not that they must apply for and secure state or local permits. Section 313 orders federal facilities to do their share in the pollution abatement effort just as every citizen must, and this is conconant with the basic purpose of the FWPCA Amendments to clean up the nation's

waters. If Congress intended otherwise, if it sought to give the states control of federal facilities through state permit programs, it would be remarkable indeed that Congress never mentioned this.

What Congress did say is that federal facilities must comply with "effluent limitations," and that compliance with effluent limitations is "the same as" compliance with "requirements."[74] The language in Section 313 therefore cannot be read to mean that compliance with "requirements" means more than compliance with effluent limitations.[75]

IV.

THE ENVIRONMENTAL PROTECTION AGENCY, WHICH IS CHARGED WITH THE ADMINISTRATION OF THE ACT, HAS INTERPRETED SECTION 313 TO MEAN ONLY THAT FEDERAL FACILITIES MUST MEET STATE EFFLUENT LIMITATIONS AND THIS INTERPRETATION IS ENTITLED TO GREAT WEIGHT

Prior to the filing of respondents' petitions for review, E.P.A. promulgated comprehensive regulations to implement the FWPCA Amendments. Section 125.2(b) of the regulations (40 C.F.R. 125.2(b)) provides that state permit programs approved by the

[74] The court of appeals candidly admitted the weakness of its own position in the face of the legislative history alone:

> If taken in isolation, certain parts of the legislative history would seem to indicate that the "requirements" language of Section 313 refers simply and solely to substantive water quality standards. [Pet. App. 15a.]

[75] As the court of appeals noted, the terms "effluent limitations" or "effluent standard[s]" are used "in a very precise sense" in the major substantive abatement provisions of the Act (Pet. App. 23a). That precision cannot be ignored, however, when the legislative history of Section 313 is considered.

E.P.A. Administrator "do not cover agencies and instrumentalities of the Federal government * * *."

As in *Train* v. *Natural Resources Defense Council,* No. 73–1742, decided April 16, 1975, slip op. 25, this interpretation by E.P.A. of Section 313 is entitled to great weight; E.P.A. is "charged with the administration of the Act" and, we submit, its interpretation is not only reasonable, but also correct in light of the Act as a whole and the history surrounding it. The "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong" [76] and here there are no such indications."[77]

Moreover, the Administrative Conference of the United States has spoken to the issue in this case and has recently recommended to the President, the Con-

[76] *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 381, quoted with approval in *New York Dept. of Social Services* v. *Dublino,* 413 U.S. 405, 421. See also *Udall* v. *Tallman,* 380 U.S. 1, 16–18.

[77] Moreover, on December 17, 1973, the President issued Executive Order 11752, 38 Fed. Reg. 34793–34797, concerning the prevention, control and abatement of environmental pollution at federal facilities. After stating that the FWPCA and other statutes required federal facilities to comply with state substantive standards and limitations regarding pollution, the Executive Order—agreeing with the earlier interpretation of Section 313 by E.P.A.—made clear that in "light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be interpreted, to require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control." *Id.* at 34793.

gress, and the Judicial Conference of the United States various procedures for ensuring compliance by federal facilities with environmental quality standards.[78] In the view of the Administrative Conference, the FWPCA, like the Clean Air Act, requires "agencies with control over federal facilities to comply with both federal and nonfederal pollution control standards." [79] Since according to the Administrative Conference even a decision by this Court in favor of respondents "will leave substantial procedural problems," the Conference has proposed amending the FWPCA (and the Clean Air Act) to vest the responsibility for developing procedures in a single federal agency which "should consider the use of emission control permits where they are not now employed." 40 Fed. Reg. at 27928.

In sum, in light of the wording of Section 313, the other provisions of the FWPCA Amendments of 1972, the legislative history of that section, the amendments as a whole, and the interpretation by E.P.A., we submit that federal facilities are not required by Section 313 to seek and obtain state discharge permits. If a contrary result is thought desirable, although the Administrative Conference has proposed otherwise, this is a matter for Congress.

[78] 40 Fed. Reg. 27925, 27928 (July 2, 1975).

[79] *Id.* at 27928.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 306 of the Federal Water Pollution Control Act, as added, 86 Stat. 854, 33 U.S.C. 1316, provides, in pertinent part:

> "(b)(1)(A) The Administrator shall, within ninety days after the date of enactment of this title publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:
>
> * * * * *
>
> "(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-

water quality environmental impact and energy requirements.

"(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

"(3) The provisions of this section shall apply to any new source owned or operated by the United States.

"(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

* * * * *

"(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Section 308 of the Act, as added, 86 Stat. 858, 33 U.S.C. 1318, provides, in pertinent part:

"(c) Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).

Section 402 of the Act, as added, 86 Stat. 880, 33 U.S.C. 1342, provides in pertinent part:

"(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

"(1) To issue permits which—

"(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

"(B) are for fixed terms not exceeding five years; and

"(C) can be terminated or modified for cause including, but not limited to, the following:

"(i) violation of any condition of the permit;

"(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

"(D) control the disposal of pollutants into wells;

"(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

"(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

"(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

"(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

"(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

"(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of

the navigable waters would be substantially impaired thereby;

"(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

"(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

"(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

* * * * *

"(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this

section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

"(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

Section 505 of the Act, as added, 86 Stat. 888, 33 U.S.C. (Supp. III) 1365, provides in pertinent part:

* * * * * *

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply

any appropriate civil penalties under section 309(d) of this Act.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brough immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

* * * * *

(f) For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act).

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

Section 509(b) of the Act, as added, 86 Stat. 892, 33 U.S.C. (Supp. III) 1369(b), provides:

> (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

Section 510 of the Act, as added, 86 Stat. 893, 33 U.S.C. (Supp. III) 1370, provides:

> Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement or pollution, except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition,

pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

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